IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1235

SHEARN MOODY, JR.,

Petitioner,

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation, Inc. hereby moves, pursuant to Supreme Court Rules 36 and 42, for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari in the above-captioned proceeding. Consent to the filing of this brief has been ob-

tained from counsel for petitioner; counsel for respondents has been contacted and has indicated that he objects.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz,* 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York,* 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California,* 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego,* No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979); *Rostker v. Goldberg,* No. 80-251 (filed July 18, 1980).

WLF believes that it is in the public interest to assure that all citizens have meaningful access to federal and state courts to vindicate their rights. The Alabama in-

junction upheld by the Fifth Circuit would clearly violate the rule in *Donovan v. City of Dallas*, 377 U.S. 408 (1964). If left undisturbed, that opinion would set a dangerous precedent that significantly encroaches upon constitutionally-protected first amendment rights and the economic interests of persons protected by the fifth and fourteenth amendments.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist this Court in obtaining full consideration of all the public interest issues involved. Not only are petitioner's interests at stake, but that of Mr. Allmon, whose suit was assisted by Mr. Moody, as well as all other individuals, businesses, and corporations which have matters that are brought routinely before both federal and state courts.

Accordingly, the Washington Legal Foundation requests that it be permitted to participate as *amicus curiae* in this matter.

Respectfully submitted,

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WLF believes that it is in the public interest to assure that all citizens have meaningful access to federal and state courts to vindicate their rights. The Alabama injunction upheld by the Fifth Circuit would clearly violate the rule in *Donovan v. City of Dallas.* If left undisturbed, that opinion would set a dangerous precedent that would significantly encroach upon constitutionally protected first amendment rights and the economic interests of persons protected by the fifth and fourteenth amendments.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may

assist this Court in obtaining full consideration of all the public interest issues involved. Not only are petitioner's interests at stake, but that of Mr. Allmon, whose suit was assisted by Mr. Moody, as well as all other individuals, businesses, and corporations which have matters that are brought routinely before both federal and state courts.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the case contained in the Petitioner's Brief for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Amicus submits that the decision of the Fifth Circuit Court of Appeals upholding the injunction of the Alabama Circuit Court is clearly wrong as a matter of law and public policy. The Fifth Circuit opinion conflicts with this Court's opinion in *Donovan v. City of Dallas,* 377 U.S. 408 (1964), as well as several other cases. The lower court opinion would permit a state court to enjoin proceedings in a federal court that are clearly in personam. If such injunctions are to be permitted, *amicus* submits that such wide deviations from the rule in *Donovan* should be given plenary examination by this Court.

Amicus further submits that the effect of the Fifth Circuit opinion would be to improperly infringe upon the First Amendment and property rights of not only petitioner, but of many other individuals, businesses, and corporations in this and other contexts.

ARGUMENT

I.

THE INJUNCTION ISSUED BY THE ALABAMA STATE COURT PROHIBITING PETITIONER FROM FILING OR AIDING ANY ACTION IN ANY COURT BROUGHT AGAINST THE ALABAMA RECEIVER IS IN VIOLATION OF THE DOCTRINE OF *DONOVAN v. CITY OF DALLAS*, 377 U.S. 408 (1964) AND THEREFORE IS INVALID.

A. It is well settled that where a state court has jurisdiction in an in rem proceeding, it may not enjoin an in personam action in federal court which, though it may relate to the state litigation, does not divest the state court of control or jurisdiction over the *res*.

An inevitable problem that arises with our federal system is the conflict of jurisdiction between federal and state courts. This Court over the years has carefully developed a body of law designed to resolve the constitutional questions inherent in the conflicts. The general rule is that federal and state courts cannot interfere with each other's proceedings. In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), this Court stated:

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed.

Id. at 412.

This exception to the "no injunction" rule applies equally to both state and federal courts, although in other contexts, the federal courts have the greater power.[1] In no case, however, may a state court enjoin an in personam action brought in federal court notwithstanding that the issues raised therein relate to the in rem state court proceeding. *Id.* at 413. To rephrase the exception in a way that reaffirms the basic principle, "state courts are *completely* without power to restrain federal court proceedings in *in personam* actions." *Id.* (emphasis added). *See Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979); 1A, Pt 2 Moore's Federal Practice ¶0.222. The Court's phrase "completely without power" could not be clearer. The Fifth Circuit below not only mistakenly started its inquiry by focusing on the exception rather than the rule of *Donovan*, but it also misapplied the exception as well.

Attempts by state courts and lower federal courts to expand upon this narrow exception to the noninteference rule, have been met with disapproval from the Supreme Court. The *Donovan* doctrine, as judge-made law, has been and should be narrowly construed and as a matter of sound public policy, only the Supreme Court should be permitted to expand its scope.

For example, in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), the New Mexico Supreme Court had

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[1] The federal anti-injunction act, 28 U.S.C. §2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

attempted to broaden the *Donovan* exception by arrogating to itself the power to enjoin all suits in federal court which may be filed in the future by the party subject to the injunction. The New Mexico court wrongly assumed that *Donovan* only prohibited injunctions against pending litigation in federal courts, leaving the states free to enjoin suits yet to be filed. Commenting that the right to litigate in federal courts is granted by Congress, this Court was quick to strike down the injunction by the New Mexico Court. *Id.* at 17. Similarly, the Fifth Circuit Court of Appeals in this case should not be permitted to broaden, without this court's review, the scope of the *Donovan* exception by permitting an entire lawsuit to be enjoined which is clearly in personam, or arguably, contains mixed in personam and in tem issues.[2]

B. The federal proceeding in *Allmon v. Bookout* was in personam and thus could not be enjoined even though it sought injunctive relief against the Alabama receivership.

Prior to the issuance of the injunction by the Alabama Circuit Court on January 6, 1975, William Allmon, an Empire Life policy-holder, filed a lawsuit against the receiver in federal district court alleging impairment of the cash value of his policy. He later filed an amended

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[2] A second suggested exception to the general rule is that an injunction would lie in those situations where a party subject to the judgment of a state court initiates harassing and vexatious litigation in the federal court on the same issue. The dissent in *Donovan* was based on this exception. But even if this exception continues to have any vitality following the majority's opinion in *Donovan*, it would clearly not apply to the case at bar because there has never been any finding in the lower courts that Mr. Moody or Mr. Allmon engaged in any vexatious or harrassing litigation.

complaint, framing a class action, and alleging that conspiracy and corruption on the part of Alabama state officials violated the civil rights of all Empire Life policyholders. Petitioner, exercising what *amicus* submits are his constitutional rights of speech and association, assisted Allmon by providing him counsel.

Allmon's suit sought both injunctive relief restraining the receiver from taking certain actions alleged to be unconstitutional and also money damages from the receiver for past injuries. *Amicus* submits that even if the injunctive relief were properly construed as a disguised in rem action, the clearly in personam money claim could not be disturbed by the state court.

The logic of the *Donovan* exception, permitting a state court to enjoin a federal action, applies only where the federal action is *exclusively* an in rem action that would interfere directly with the state court's jurisdiction over the *res*. For instance in *Blackhawk Heating & Plumbing Company Inc. v. Geeslin,* 530 F.2d 154 (7th Cir. 1976) the Seventh Circuit ordered a federal in rem action dismissed since a state proceeding had already established jurisdiction over the *res* in an earlier in rem action. The federal court could only grant plaintiff's relief by destroying the state court's previously-established jurisdiction over the property; this it was precluded from doing by the *Donovan* doctrine.

Conversely, an in personam action filed in federal court which would establish a claim on the funds held in a state court in rem proceeding, may never be enjoined. Such an action, while it might *affect* the state court proceeding, would not *destroy* the state court's jurisdiction over the *res* and therefore may not be enjoined. *Mills v. Roanoke Industrial Loan and Thrift,* 70 F.R.D. 448 (W.D. Va. 1975); *Slotkin v. Brookdale Hospital Center,*

357 F. Supp. 705 (S.D.N.Y. 1972). Logically therefore, where in personam relief (e.g. money damages or a declaratory judgment) is sought in a proceeding which also seeks to challenge the state court jurisdiction over an in rem suit, an injunction barring this entire action is not justified. Federal courts which have confronted such suits have not ordered dismissal for lack of jurisdiction, but rather have chosen to adjudicate the in personam issues raised while dismissing the in rem aspects of the suit.

For example, in *Purcell v. Summers,* 126 F.2d 390 (4th Cir. 1942), *cert. denied,* 317 U.S. 640 (1942), a lawsuit was brought by certain bishops of the Methodist Church seeking a declaratory judgment as to the effects of a union between the northern and southern branches of that church and a determination of property rights of the various branches. The suit was originally dismissed by the District Court because when it was filed, eight separate state court suits were pending to determine the same property issues brought before the federal court. The Fourth Circuit nevertheless reversed in part, holding that the federal court did have jurisdiction to grant the declaratory judgment sought by plaintiffs:

> . . . where the jurisdiction of a state court has first attached to property, a federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction. (citations omitted). This does not mean, however, that the federal court is without power to render a judgment between the same parties with respect to other matters; and it is no objection to such exercise of jurisdiction that it may result in the determination of questions which are involved in the state court litigation.

126 F.2d at 395.

The *Purcell* decision was based on *Watson v. Jones,* 13 Wall. 679 (1872) where this Court held that if there is *any* relief a federal court can grant which will not disturb the jurisdiction of a related state court proceeding, the court has a right to hear the case and grant that relief. *Id.* at 720.

Another compelling example of a mixed in personam and in rem action and cited by Petitioner was *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Company,* 600 F.2d 671 (7th Cir. 1979). Although the court recognized the split nature of the relief sought, it did not believe that this was sufficient to defeat federal jurisdiction. *Id.* at 675.

Similarly, the split nature of the relief sought by Allmon, in the action assisted by petitioner Moody, does not justify the over-reaching injunction issued by the Alabama Circuit Court. Only a purely in rem action could be enjoined; any other suit should be left to the discretion of the district court judge to grant appropriate relief not inconsistent with the existing state court in rem proceeding. Because the state court injunction was overly broad, the contempt judgment and related civil judgment on appeal to this court must be overturned.[3]

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[3]It also appears that the Final Judgment issued by the U.S. District Court, Southern District of Texas, Galveston Division against petitioner on November 14, 1978 (Pet. App. 12a) is invalid also because it conflicts with valid Texas law that expressly gives petitioner and other stockholders of Empire Life Insurance Company the right to sue the State of Texas. *Amicus* App. 1a.

II.

THE STATE COURT INJUNCTION PROHIBITING PETITIONER FROM FILING OR AIDING ANY ACTION IN ANY COURT BROUGHT AGAINST THE RECEIVER VIOLATES THE CONSTITUTIONAL RIGHTS OF PETITIONER AND OTHER PARTIES TO THE LITIGATION.

Article III of the United States Constitution and various federal statutes guarantee citizens of the United States access to the federal courts.[4] The Framers recognized that citizens must be allowed to resort to the neutral forum of a federal court in certain cases. For this reason, it has been consistently held that states could not, under the guise of prescribing the modes of redress in their courts or regulating the distribution of their judicial power, enact legislation impairing access to the federal courts. *Marshall v. Baltimore & O. R. Co. v. Henderson,* 57 U.S. 314 (1854); *Hyde v. Stone,* 61 U.S. 170 (1858); *Hayes v. Pratt,* 147 U.S. 557 (1893); *Blacker v. Thatcher,* 145 F.2d 255 (9th Cir. 1944), *cert. denied,* 324 U.S. 848 (1945). A judicial decree of a state court does not differ in any material respect from a statute enacted by a state legislature, and thus cannot impair access to the federal courts.

Amicus submits that the Alabama Circuit Court was totally unjustified as a matter of law and policy in issuing the broadly worded injunction prohibiting the

> filing, financing, sponsoring, initiating or aiding in whole or in part, *in any way* the filing of any lawsuit, complaint, or legal claim, or any amendment to any complaint or legal claim in any court . . . on behalf of any party

relating to the receivership without the court's permission. Petitioner's Brief at 4-5 (emphasis added). This

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[4] 28 U.S.C. §1251.

injunction sweeps too broad, is vague, and violative of petitioner's and others' constitutional rights of speech and association, not to mention their property rights under the Fifth and Fourteenth Amendments.

This court has held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. Michigan Bar,* 401 U.S. 576, 585 (1971). See also *Bates v. State Bar of Arizona,* 433 U.S. 350, 376 n.32 (1977). While recognizing that state courts and legislatures may act to protect legitimate interests, such as the state court's jurisdiction over a company in receivership, such court orders and laws may never impair the freedoms of speech and association protected by the first amendment. *In Re Primus,* 436 U.S. 412, 426 (1977); *Buckley v. Valeo,* 424 U.S. 1 (1976).

Statutes regulating first amendment freedoms must be narrowly drawn to prevent only that evil which it is within the power of the state to control. *Sheldon v. Tucker,* 364 U.S. 479 (1960); *Elfbrant v. Russell,* 384 U.S. 11 (1966). There can be no doubt that this central principle of constitutional law applies equally to court orders. Nor can there be any doubt that the sweeping and vague injunction issued by the Alabama Circuit Court violates the first amendment rights of petitioner and other parties to the litigation. It also denies him and others of important rights to protect their property interests.

The Alabama injunction not only prohibits petitioner from filing any lawsuit against the receiver without permission, it even prevents him from "aiding in whole or in part, in any way the filing of any (such) lawsuit." This

language not only prohibits petitioner from filing such a suit himself, it even prohibits him from exercising his elementary first amendment right to discuss the issue with a party such as Allmon who has filed such a suit. Nor would petitioner be permitted to bring an in personam lawsuit against the receiver even though it did not infringe on the jurisdiction of the state court, a right clearly guaranteed by *Donovan.*

The first amendment rights of Willie Allmon and other parties who are not even subject to the decree are also infringed. Because the injunction prohibits petitioner from "aiding in any way" the filing of a suit against the receiver, Allmon or others would be unable to communicate with petitioner about any lawsuit they might file. Given the importance of petitioner to any lawsuit involving Empire, this ban effectively nullifies Allmon's first amendment right to prosecute such a suit or receive financial support.

The Washington Legal Foundation believes that the injunction issued by the Alabama state court, which purports to be necessary for the protection of the court's jurisdiction over the Empire Life Insurance Company is contrary to the public interest and should not be allowed to stand. In order that this case not be allowed to establish a damaging and dangerous precedent,[5] WLF urges this court to grant a writ of certiorari and overturn the decision of the Fifth Circuit Court of Appeals.

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[5]This action was brought under 42 U.S.C. §1983. Unless the decision of the Fifth Circuit is reversed, future parties alleging injury by violations of the civil rights laws in the more traditional contexts may be unable to successfully vindicate their rights in federal courts.

CONCLUSION

State courts are not permitted to issue injunctions prohibiting parties subject to their jurisdiction from bringing an action in federal court which is in personam, even though it might interfere with or relates to the *res* under the enjoining court's jurisdiction. Any injunction must be narrowly drawn and directed toward exclusive in rem actions which would seek to wrest jurisdiction or control over the *res* from the enjoining court. And in no case may such an injunction, even if permitted, impair the rights of freedom of speech and the guarantee of access to the federal courts which are protected by the constitution. For all of the these reasons, amicus believes that the Alabama state court injunction and the decision of the Fifth Circuit upholding that injunction are contrary to the public interest and should be declared unconstitutional. We urge the Supreme Court to grant cerriorari in this case to review these important questions and

reaffirm the constitutionally protected rights which have been called into question by the decision of the Fifth Circuit.

Respectfully submitted,

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February 20, 1981

APPENDIX

APPENDIX A

H.C.R. No. 118

HOUSE CONCURRENT RESOLUTION

WHEREAS, W. L. Moody & Company, Bankers, Unincorporated, and certain stockholders of the Empire Life Insurance Company of America allege that they have been unlawfully deprived of substantial property interests; and

WHEREAS, W. L. Moody & Company, Bankers, Unincorporated, and certain stockholders of the Empire Life Insurance Company of America allege that the deprivation of their interests was caused by the wrongful acts of certain agents, employees, and elected officials of the State of Texas during the course of receivership proceedings; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That W. L. Moody & Company, Bankers, Unincorporated, and any stockholder or group of stockholders of the Empire Life Insurance Company of America be and are hereby granted permission to sue the State of Texas for the relief to which they may be entitled concerning their claim; and, be it further

RESOLVED, That in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas and that the suit be tried as other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions, of liability or of the truth of any allegation asserted by the claimants, but the alleged cause

of action must be proved under the laws of this state as in other civil suits; and, be it further

RESOLVED, That nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

/s/ _____ /s/ _____
President of the Senate Speaker of the House

I hereby certify that H.C.R. No. 118 was adopted by the House on May 27, 1975, by a non-record vote.

/s/ _____
Chief Clerk of the House

I hereby certify that H.C.R. No. 118 was adopted by the Senate on May 29, 1975.

/s/ _____
Secretary of the Senate

APPROVED: June 19, 1975

/s/ _____
Governor

[Filed in the Office of the Secretary of State, 6:30 PM o'clock – JUN 19 1975

/s/ _____
Secretary of State]